

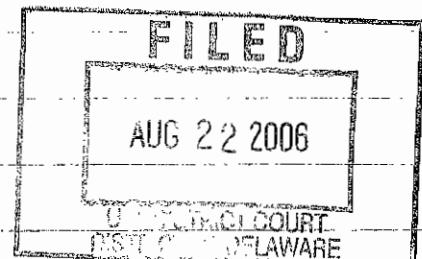
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

REGINALD HARRIS
Petitioner,

CASE No. 1:06-cv-430
(SLR)

v.
THOMAS CARROLL
Respondent,



BD scanned

MOTION TO AMEND MOTION TO "STAY AND ABEY"

Comes Now, the petitioner Reginald Harris, Pro Se,
respectfully requesting this Honorable Court, pursuant to

Federal Rules Civ. Proc. Rule 15(c), to amend or

permit petitioner to amend his original motion to
"Stay-and-AbeY."

In support of this request, petitioner submits
the following:

1. It is plain that the central policy of
Rule 15(c)- is ensuring that the non-moving party
has sufficient notice of the facts and claims
giving rise to the proposed amendments.

2. Petitioner wishes to incorporate additional
claims of ineffective assistance of counsel, as
amended to his Rule 61 Postconviction (see attached
Motion to Amend postconviction), to Habeas Corpus
Petition's "unexhausted claims".

3. Again, The District Court may in its
discretion, allow a petitioner to amend a mixed
petition by deleting the unexhausted claims, hold
the exhausted claims in abeyance until the

unexhausted claims are exhausted; then allow the petitioner to amend the stayed-petition to add the "NOW-Exhausted" claims. See and compare: Anthony v. Cambra, 236 F. 3d 568, 575-578 (9th Cir. 2000).

Wherefore, the petitioner, respectfully request this Honorable Court to issue an order to "STAY" the exhausted claims, pending the exhaustion of the unexhausted claims.

Respectfully Submitted,

Reginald Harris
Reginald Harris, Pro Se

Dated: August 14, 2006

Certificate of Service

I, Reginald Harris, hereby certify that I have served a true and correct cop(ies) of the attached: Motion To Amend Motion To "Stay And Abey," Attached: First motion To Amend Postconviction upon the following parties/person (s):

original and Two copies

TO: Office of The Clerk
United States District Court
844 N. King Street, Lockbox 18
Wilmington, Delaware
19801-3570

one (1) copy

TO: Timothy J. Donovan, Deputy A.G.
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

one (1) copy

TO: Reginald Harris "FILE"
Delaware Correctional Ctr. MNU22-B
1181 Paddock Road
Smyrna, Delaware
19977

TO: _____

BY PLACING SAME IN A SEALED ENVELOPE and depositing same in the United States Mail at the Delaware Correctional Center, 1181 Paddock Road, Smyrna, DE 19977.

On this 14th day of August, 2006

Reginald Harris

IM 19911d HARRIS
SER# 12-1812 UNIT 22 B
DELAWARE CORRECTIONAL CENTER
1155 PINE ST WILMINGTON DE
SMYRNA DELAWARE 19977

Other
United States
Smyrna
Wilmington

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEWCASTLE COUNTY

STATE OF DELAWARE }
|
REGINALD HARRIS }
|
} CASE I.D. #0402010.364A
} Cr. A. IN04-05-1480R1, 1481R1,
} 1483R1, 1484R1, 1486R1, 1487R1,
} 1488R1, 1489R1

FIRST MOTION TO AMEND POSTCONVICTION

Comes now, defendant Reginald Harris, Pro Se,
respectfully requesting this Honorable Court, pursuant to
Superior Court Criminal Rule 41(b)(6), to permit petitioner
to amend his Postconviction Motion to incorporate
additional constitutional claims.

Dated: August 14, 2006

Reginald Harris
Reginald Harris
D.C. MHU 22-B
1181 Paddock Rd.
Seaford, De. 19977

STANDARD AND SCOPE OF REVIEW FOR

INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prove ineffective assistance of counsel, the defendant, in a post conviction proceeding, must demonstrate that counsel's representation "fell below an objective standard of reasonableness, and that counsel's actions were prejudicial. There is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different." Skinner v. State, Del. Supr. 607 A.2d 1170 (1992), quoting Strickland v. Washington, 466 U.S. 688 (1984). In applying the Strickland Standard, there is a "strong presumption that the representation

"...was professionally reasonable." Wright v. State,
Del. Supr. 671 A.2d 1353 (1996).

A. Ineffective Assistance of Counsel

1. Defense Counsel was ineffective by failing to appear

to represent, consult and/or advise defendant at important court proceedings.

a) Defense Counsel was not present at Preliminary

Hearing 03/04/04, Arraignment/Bail Hearing 04/16/04, Case Preview 05/04/04, and Arraignment/Bail Hearing 06/04/04

to consult or advise defendant, as to the means by

which they were to be pursued.¹¹ The Sixth Amendment

right to counsel, of course, guarantees more than

just a warm body to stand next to the accused

during critical stages of the proceedings; an accused

is entitled to an attorney who plays a role

"NECESSARY TO ENSURE THAT THE PROCEEDINGS ARE FAIR."

U.S. ex rel. Thomas v. O'Leary, 356 F.2d 1011, 1115 (7th Cir 1988).

b) Had counsel been present at the preliminary hearing, defense could have contested the reliability of the anonymous caller and the information contained in the call, as to show that it was insufficient to establish probable cause or reasonable suspicion, to detain or arrest defendant. See Florich v. J.L., 120 S. Ct. 1375, 1379 (2000).

It is highly probable that the charges against defendant would have been dismissed for lack of probable cause.

c) Had defense counsel been present at the Arraignment/Bail Hearing of the Amended indictment on 10/04, she could have made a timely objection to the Four (4)

Additional Felony counts that were included in the amendment in violation of Superior Court Criminal Rule 7(a). It is highly probable that the four (4) additional Felony counts would have been dismissed from the indictment, had counsel been present to represent the defendant, and made a timely objection and/or filed a timely motion to dismiss the unlawfully amended indictment.

2. Trial Counsel was ineffective by failing to timely raise claims that indictment was improperly multiplicitous in violation of the Double Jeopardy Clause of the United States and Pennsylvania Constitutions.

a) Defendant was arrested Feb. 17, 2004, indicted by the Grand Jury March 04, 2004, on six counts (Int. Coco., PFDCE, PDWBPP, Poss. Drug Parap., Poss. of Marijuana, Maint. Vehicle). On May 17, 2004, three months after defendants arrest, the state filed an amended indictment that included 2 additional PFDCE counts, 1 PLWTD NSII CS, and 1 CCDW counts, which were omitted from the original indictment.

b) This constituted a prejudicial amendment of "substance", which duly implicated both due process and double jeopardy principles of constitutionality.

Superior Court Criminal Rule 7(c); U.S.C.A. Const. Amend. 5.

Defense Counsel's failure to timely object to the

improperly multi-counts and amended indictment,
prejudiced defendant by putting him in jeopardy of
being prosecuted for offenses that the original
Grand Jury did not originally indict or even
consider, and be sentenced multiple times for the
SAME offense.

3. Defense counsel was ineffective by failing to
timely raise claims, that the anonymous call was
lacking indicia of reliability to justify a stop and
frisk under the Terry standard, at Trial and Direct
Appeal.

a) After the anonymous call, reported to

the Wilmington Police, that a guy sitting in a vehicle behind the police cars in the middle of the street "might possibly" have something to do with the incident that yall are investigating, officers (3 or 4) approached the vehicle and saw one person, defendant Harris, in the drivers seat of the vehicle. Apart from the anonymous call the officers had no reason to suspect the defendant of illegal conduct. The officers did not see any criminal activity or observe any unusual conduct. Without saying anything or asking any questions, one of the officers opened the driver's door, removed and ordered the defendant to the rear of the vehicle, where this

officer frisked defendant and seized a gun from his pocket. Defendant was charged under state law with a weapon and various drug offenses.

b) Trial counsel has a duty to thoroughly review the facts of the case to determine whether or not a warrantless seizure and search by the police, leading to the discovery of contraband, violates a defendant's state and federal constitutional rights against unreasonable seizure and searches. ("At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.") See Nearly v. CABANHA, 769 F.2d at 1177 (5th Cir. 1985).

Counsel did not even interview or consult with defendant about the facts of the case. Counsel never filed a discovery request, and the day defendant met counsel she was asked by defendant to file a motion to compel the evidence, counsel responded with "I don't feel we need to, because I believe the state has given us everything."

c) First, the ANONYMOUS CALLER NEVER SAID OR STATED THAT SHE "ACTUALLY SAW" defendant involved OR ENGAGED IN ANY CRIMINAL ACTIVITY. The call provided no indication of a relationship between the caller and the defendant or why the caller claimed he "might possibly" have something to do with the unrelated.

incident. In short, the call provided no legitimizing context whatsoever, and thus it failed to indicate whether it was based on personal observation or mere speculation. When suspicions arise not from any observations of police officers "but solely from a call made from an unknown location by an unknown caller," whose reputation cannot be assessed, the police must engage in suitable corroboration of the alleged criminal activity. Florida v. J.L. 126 S. Ct. at 1378. Suitable corroboration must exhibit sufficient indicia of reliability in order for an anonymous tip to provide either a reasonable suspicion of criminal activity or probable cause to

arrest or to search. See id. Merely providing "[a]n accurate description of a suspect's readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity." Id. at 1379. An anonymous tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. Here, the officers did not have probable cause to open the car door and seize and search the defendant. Prior to entry of the vehicle, there was no reasonable suspicion that defendant was engaged in criminal activity, nor was there probable cause to believe that contraband was likely to be

.. found on defendant or in the vehicle. The officers
never testified to any objective facts supporting a
belief that any evidence of an illegal nature
would probably be found.

Again, the officers did not have reasonable
suspicion or probable cause that defendant Harris
was engaged in illegal activity prior to directing
him to exit the vehicle. At the point that the
defendant was ordered out of the car, there was
no reasonable and articulable suspicion that he
was engaged in criminal activity. While the state
pointed to the unreliable anonymous call and the
investigation of the unrelated incident, this did

not provide an objective basis for seizing the defendant.

Defense counsel was ineffective by failing to contest the reliability of the anonymous call, since there was insufficient reasonable suspicion or probable cause to support the officer's actions.

Defendant suffered prejudice as a result of counsel's ineffectiveness by the admissibility of the weapon and drugs found on defendant following the improper seizure and search. Viewed from any perspective, there was insufficient constitutional justification to support the seizure and search of the defendant or his vehicle. Reasonable counsel should have recognized the constitutional issues and

pursued them in her motion to suppress. It is highly probable that the motion to suppress would have been granted, and the weapon and drugs suppressed, based upon existing Law. The charges against the defendant would have been dismissed if the motion to suppress was granted. J.L., 120 S.Ct. 1375 (2000).

4. Defense Counsel was ineffective by failing to object adequately to, and then to appeal, the admission of testimony concerning the anonymous callers statements as "inadmissible hearsay" under Delaware Law.

a) During trial the prosecution elicited testimony from the officers regarding what was said

to the dispatcher by the anonymous caller, without
the objection from defense counsel. Hearsay.

Testimony that law enforcement officers use and
rely upon for investigation and the gathering of
evidence, of course, is not evidence properly to be
used in the trial of a criminal case. Defense
counsel should have objected and argued, that
the testimony concerning the content of the anonymous
call implicated the defendant's right to confront
his accuser under the Confrontation Clause of the
Sixth Amendment of the United States Constitution.

The admission of and the defense counsel's
failure to object to this "inadmissible hearsay" form

of testimony was both erroneous and prejudicial.
And, the failure of defendant's counsel to pursue
this issue on appeal, when an effective advocate
would have, entitles him to a second chance.

Conclusion: Defendant contends that but for
counsel's unprofessional errors set forth herein,
the result of the trial would have been different,
and that the prejudice caused by the errors
(individually or cumulatively) deprived him of a
fair trial.

Therefore, Plaintiff asks that the court
grant him all relief to which he may be

entitled in this proceeding. Movant is seeking
the following:

1. Fact finding hearing;
2. Order reversing his convictions and
sentence, and ordering a new trial.

Dated: August 14, 2006

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